

"Nine Eleven has caused a shift in the American legal awareness"

Dieter Grimm

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Recent revelations that the NSA is systematically wiretapping into conversations by heads of state and government of allied states are mainly seen as a political problem in the US, not necessarily as a legal one. How do you explain this?

There are mainly two explanations. First, the US views its constitution as one that protects its citizens from their public authorities. When it comes to foreign citizens, public authorities have much greater powers, especially if their actions are intended to protect American citizens. Many people even assume that American public authorities are only bound to the US constitution on US territory. Second, 9/11 has shifted legal awareness in the US. Protection from terrorist attacks is regarded as a justification for many actions that used to be illegal. This is a widely shared opinion, even if it is subject to some controversy

Can activities of foreign secret services be legally framed at all, regardless of whether they concern an allied nation or not?

Of course they can be legally framed. If a specific act is illegal according to the law of the state on whose territory that act takes place, then the act is prohibited for foreign secret services as well, unless the country in question has allowed such acts through an agreement. If no such prohibition exists, the state can pass legislation to prohibit the act. Another possibility would be a bilateral agreement that prohibits wiretapping activities. The challenges can rather be found on a factual level. It is technically possible to wiretap into conversations held on or coming from a country's territory, without entering said territory. And even if legal standards exist, be they in the form of national legislation or treaties, it is still difficult to detect breaches of the law. Without Snowden, we wouldn't know any of the facts that are now causing such agitation and outrage.

Some people are speculating that the German government is condoning NSA activities, that Germany is in fact bound to do so on the basis of post-war international treaties. From a constitutional law point of view, is the German government even allowed to tolerate this practice, let alone enter an obligation to do so? Where are the boundaries set by the German Basic Law?

Foreign affairs are bound to the standards of the basic law. International treaties concluded between the German government and other nations have repeatedly been subject to constitutional review in front of the Federal Constitutional Court.

After the NSA affair, is it still reasonable to hope that the global struggle of political and economic interests might be resolved into a rule-based order?

No state can do that on its own. All state-imposed rules are only valid for that state's organs or territory. Global actors, be they political or economic ones, need to be controlled globally. A single state is fighting a losing battle when there is no territorial affiliation. National politics then need to enter negotiations, and we all know the problems that come with it. Those suffering from wiretapping will be ready to accept rules, those who benefit from it won't be. Even if those nations who care about fundamental rights came up with a consensus, many other states would be left. Of course, that should not prevent us from trying to enter into international agreements. But we need to be aware that great achievements can only be made through small steps.

Should the NSA scandal be a reason for us to finally be serious about a common foreign and security policy in the European Union?

It doesn't even have to be the entire common foreign and security policy. Much would be gained if the planned EU General Data Protection Regulation took recent developments into account and then entered into force rather sooner than later. That would be one of those small steps.

Questions: Maximilian Steinbeis; Translation: Hannah Birkenkötter

